No. 2911

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. CHAPMAN and P. R. THOMPSON, Co-partners doing business under the firm name of CHAPMAN & THOMPSON,
Plaintiffs in Error.

vs.

JAVA-PACIFIC LINE, a corporation, STOOMVAARTSCHAPPY NEDERLAND, a corporation; ROTTERDAMSCHE LLOYD, a corporation; JAVA-CHINA-JAPAN LYN, a corporation; BLACK COMPANY, a corporation, and WHITE COMPANY, a corporation.
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ORAL ARGUMENT OF MR. HARWOOD ON BEHALF OF PLAINTIFFS IN ERROR.

Tuesday, March 20, 1917.

MR. HARWOOD: May it please your Honors: I will read the allegation of subdivision 5 of paragraph I of the answer in relation to the alleged prior communications. It reads as follows:

> "That thereafter (after receipt of these communications referred to in the answer) said J. W. Chapman requested the defendants to hand

> him a memorandum of the reservations so made by plaintiffs as aforesaid, with which request said defendants complied. That thereupon the said plaintiffs wrote the letter set forth in the complaint under date of January 27, 1916; that understanding said letter to be part and parcel of said transactions and correspondence preceding, and not otherwise, and were a part and parcel of the said contracts, and not otherwise, and they then and there were at all times understood to be part and parcel of said contracts between said defendants and the Pacific Coast Steel Company and not otherwise."

In other words, if your Honors please, in this answer there is alleged the erroneous conclusion of law that prior communications and transactions which antedate the written contract were not merged in that written contract, but that they control the written contract, and that the written contract itself was but a "part and parcel" of preceding communications and correspondence. Not only is this not an allegation of fact, but it is an absolutely erroneous conclusion of law.

A demurrer was interposed to this part of the answer, and the demurrer was overruled by the trial court, and that is one of the errors assigned here.

Now, during the trial, evidence was introduced and the court permitted evidence under these allegations of the answer, and, the evidence being admitted, the court instructed the jury to return a verdict in favor of defendants. This appeal is from the judgment rendered in pursuance of that instruction.

There is practically but one point of law involved in the case. The same point arises on the demurrer

to the answer, and it arises on the admission of the evidence under that answer, and it is: Is it competent to introduce prior communications, letters and oral testimony antedating a written contract, for the purpose of showing that that contract, or the legal effect of that contract, or the terms of the contract, have a different meaning from the meaning apparent on the face of the contract?

Now, we will take subdivision 3 of paragraph I of the answer as an example. In doing this we will abbreviate the argument, because there are a great many communications alleged in this paragraph, and subdivision 3 is typical. Your Honors will remember that we have two letters, of date January 27 and February 12, forming an absolute contract between these parties, complete in all its details and binding upon both parties. Now, here is the allegation with reference to one of the prior communications. I am reading from page 21 of the transcript, and subdivision 3 of paragraph I of the answer:

> "That on December 30, 1915, the said plaintiffs, then and there representing themselves to be acting as agents for and on account of the Pacific Coast Steel Company, booked for account of said Pacific Coast Steel Company space for 1000 tons of bar iron, for shipment from San Francisco to Hong Kong and Manila on the steamer 'Karimoen', scheduled to said April 22, 1916."

This is an allegation that on December 30, 1915, plaintiff booked for the Pacific Coast Steel Company certain freight on a certain steamer scheduled to sail at a certain time, and it is contended that it is competent to prove that fact for the purpose of showing

that the contract is not what on its face it purports to be, that is, the contract of Chapman & Thompson. The contract alleged in the answer is an oral transaction entered into on the 30th of December, 1915, about six weeks before the final written contract was consummated. That subdivision is typical of the other subdivisions of this part of the answer.

Now, if your Honors please, at the trial the defendants offered in evidence the various communications between the parties, all antedating the contract evidenced by those two letters in writing, and in various letters, all before January 10th, the space therein referred to is stated to be for account of Pacific Coast Steel Company. The last letter which makes any reference to the Pacific Coast Steel Company is the letter of January 10th, and at all times as shown by the letters, the parties were in oral communication with each other; they both resided in San Francisco, and they were every day, probably, in oral communication with each other regarding the matter.

Now, let us assume in this case that the evidence supported this particular allegation of the answer: We have a contract here between Chapman & Thompson and the Java-Pacific Company reserving space for Chapman & Thompson at specific rates for definite voyages and the defendants were permitted to prove that on December 30th, 1915, the plaintiffs, Chapman & Thompson, representing themselves to be acting for the Pacific Coast Steel Company, booked for the account of Pacific Coast Steel Company space for 1000 tons of bar iron on a steamer to sail in April. A more clear attempt to change the

terms and legal effect of a written contract cannot be imagined than this is.

Now, if your Honors please, I will just cite and read briefly from two cases on this point. One is the case of *Ferguson* v. *McBean,* 91 Cal., page 72, where the Supreme Court of California—the court sitting *en banc* and all of the justices concurring—said:

> "It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract. For a full and able discussion of the whole subject see *Chandler* v. *Coe,* 54 N. H. 561, and *Gillig* v. *Road Co.,* 2 Nev. 216, and cases therein cited.
>
> Considered independent of authority, we think sound policy requires the enforcement, in cases such as these, of the general rule that a writing cannot be varied by parole. It is as important to know who has made a contract as to know its terms; and when the parties put it in writing, there is no more reason or excuse for omitting the name of a known party, whom it is the intention to bind, than there is for omitting its most important stipulation. To allow such a practice opens the door, in every case, to such conflicts of evidence as this case illustrates upon a point which can be easily and forever set at rest by simply making the written evidence of the contract conform to the mutual understanding of the parties as to matters fully within their knowledge."

In the case of an undisclosed principal the rule may be different. It is held in such a case there is no variation of the contract by proving that he is bound or is entitled to the benefits of it. The rule in the

case of an undisclosed principal is an anomalous rule; it only applies when the principal is undisclosed and does not apply to a case where A purports to contract for B and then signs a contract in the name of himself. That has been held by the Supreme Court of the United States in a case cited in the brief, in which case the Supreme Court said that under those circumstances the party is conclusively presumed to have elected to look to the agent and not to the principal.

The other cases on that point are cited in the brief, but I will just read one extract from the case of *Cream City Glass Company* v. *Friedlander*, 84 Wis., 53, 36 Am. St. Rep. 895. The defendant Friedlander, when sued on a contract of purchase and sale, entered into in his own name, defended on the ground that he was acting merely as a broker, and that the plaintiff knew that he was so acting. In ruling that the testimony that the defendant was acting as a broker was properly ruled out, the Supreme Court of Wisconsin said:

> "The defendant claimed that he only acted as a broker between the plaintiff and the Liverpool firm for the sale of the soda ash in question, and upon the trial offered much testimony, consisting of letters and telegrams which passed between himself and the plaintiff, and which led up to and finally culminated in the written contract of sale which is set forth in the statement of the case. This testimony was offered for the purpose of showing that defendant acted simply as a broker, and that the contract should be construed simply as a broker's sold note. This testimony was all rejected by the trial court, upon the ground that it tended to vary and contradict

> the terms of a written contract. This ruling was strictly right. The contract which defendants executed, and under which the goods were delivered, was a plain and unambiguous contract of sale, and upon familiar rules previous negotiation could not change its legal effect. There was nothing to prevent the defendant from making a contract binding himself personally if he chose to do so, notwithstanding his ordinary business may have been that of simply a broker, and notwithstanding also the fact that he may have preliminarily negotiated in the capacity of a broker in this very transaction."

If your Honors please, the other cases are cited in the brief of plaintiffs in error, and it is not necessary to read them here.

Now, I will answer the contentions advanced by the defendants in error in their brief. I will state, and I think that your Honors will agree with me in the statement when you come to consider the case, that there is absolutely no attempt in the brief of defendant in error in any way seriously to maintain that the court did not err in this case, both in overruling the demurrer to that part of the answer and in admitting in evidence these letters and communications.

Reply to contention that plaintiffs are "estopped" to insist on objections

Now, the very first argument made in the brief of defendant in error is this: The plaintiff is estopped by the pleadings to allege that the court erred in overruling the demurrer to that part of the answer and in admitting in evidence these letters, and this remarkable statement is based upon an allegation in the complaint which was redundant and which is really surplusage. The whole allegation could have been left out and the complaint would

have stated a cause of action. That allegation was wholly unnecessary to state a cause of action. This allegation of the complaint is as follows; I am reading from the brief of defendant in error:

> "That prior to the 27th day of January, 1916, plaintiffs requested defendants to reserve for plaintiffs space in the steamers of defendants sailing from San Francisco to Hong Kong and Manila during the months of February, March, April, May and June, 1916. That on the 27th day of January, 1916, plaintiffs wrote and delivered to defendants a letter in the words and figures following" etc.

Then follows the letter which I have read to your Honors. In other words, if your Honors please, here is a redundant allegation in the complaint. The complaint would have stated a cause of action if it merely had alleged that on the 27th day of January, 1916, plaintiffs wrote to defendants the letter set forth in the complaint. But as explanatory matter, and merely as surplusage, we alleged that plaintiffs requested defendants to reserve for plaintiffs space, and counsel for the other side seize upon that allegation, which is redundant, and say, that because of that allegation in our complaint, we are estopped to question the rulings of the court that the allegations in their answer were proper, and that the extrinsic evidence was properly admissible.

Now, as to the matter of surplusage, I will cite your Honors to the case of *Henke* v. *Eureka Benevolent Association,* 100 Cal., page 433, which clearly states the rule that matters such as this are merely surplusage, and there is no necessity even for the plaintiff to prove them.

Now, it is quite apparent that counsel for defendants in error in this case have a very hazy idea as to the meaning of the word "estoppel". They say that we are estopped to insist on these objections because we inserted this redundant matter in the complaint.

"Estoppels" are defined in *Bouvier's* dictionary as follows:

> "By matter of record: Such as arises from the adjudication of a competent court."
>
> "Estoppel in pais arises from acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself."

Bouvier cites *Bigelow,* Section 437, to the effect that the following elements must be present in order to constitute an estoppel by conduct:

1. There must have been a representation or concealment of material facts.

2. The representation must have been made with knowledge of the facts.

3. The party to whom it was made must have been ignorant of the truth of the matter.

4. It must have been made with the intention that the other party should act upon it.

5. The other party must have been induced to act upon it.

And consequently that the other party must have been injured by acting upon it. All these elements go to make up estoppel.

Now, of course, if a party alleges a certain fact in his complaint he will be, at the trial of the case,

using the word in a loose way, "estopped" to deny the truth of the fact which he alleges. In other words, it is not competent for him in the trial court or in the appellate court to say that that allegation is not the fact, although he has alleged it in his complaint.

If that is the kind of "estoppel" to which counsel refer, the answer is simply this: We allege that prior to the 27th day of January, plaintiffs requested defendants to reserve space for plaintiffs. That allegation is directly contrary to the contention of the defendants in error in this case; they contend that we requested them to reserve space, not for the plaintiffs, but for the Pacific Coast Steel Company. If there is any question of "estoppel", the estoppel would work the other way. The allegation of the complaint is that we requested defendants to reserve space for the plaintiffs, and we are not in any manner disputing that allegation; therefore, the question of such an "estoppel" does not arise.

Alleged "construction" by parties

Now, the next contention advanced in the brief is that the parties themselves construed the contract as we construe it. In other words, the defendants in error say that they construed the contract as a contract with the Pacific Coast Steel Company, and it is said that both parties construed it the same way. Of course, primarily, the construction placed upon a contract by the parties is only material where the contract is ambiguous; this contract is not in any sense ambiguous as to who is bound by it. It is a contract with Chapman & Thompson. The question of construction would be wholly immaterial; but the statement that the parties so construed the contract is absolutely at variance with the record.

Defendants say regarding the February shipment: This shipment was confirmed by the Pacific Coast Steel Company as their contract entered into with them by virtue of these antecedent letters, and not by virtue of the letter of January 27th, and in this claim the plaintiffs acceded.

February shipment was furnished by Steel Company under the written contract between the plaintiffs and defendants

That statement is absolutely at variance with the record. Now, the facts are these, that on the 28th day of January, 1916, the Pacific Coast Steel Company (Record page 86) wrote to defendants, confirming bookings for 1110 tons of bar iron and steel under 30 feet in length, for February shipment.

But this claim was not based on the antecedent letters, *but was based on the right given the Steel Company by Chapman & Thompson under their contract with the Java-Pacific Line.* There is no reference in the antecedent letters to bar iron, nor is there any reference to the length of the bars. But the letter of January 27th refers to bar iron under 30 feet in length, and the letter from the Pacific Coast Steel Company refers also to bar iron under 30 feet in length. The reference in the Pacific Coast Steel Company letter is the same as the reference in the contract. This letter was written in pursuance of a request made by Mr. Connor.

JUDGE HUNT: Which letter are you referring to?

MR. HARWOOD: I am referring to a letter dated the 28th of January, from the Pacific Coast Steel Company to the defendants. (Record pg. 86.) Mr. Chapman testified (Record pg. 120):

> "Q. State what Mr. Connor said to you on the 'phone and what you said to him? A. Mr.

> Connor asked who would ship the 1110 tons on the February steamer, and I replied that it would be shipped by the Pacific Coast Steel Company. Connor then requested from us a letter direct from the Pacilc Coast Steel Company to the Java-Pacific Line, confirming the bookings, and that they would ship."

Mr. Connor did not contradict this testimony in any particular. Of course, the question of contradiction is not involved in this case where there was a directed verdict.

Chapman & Thompson were under no obligation to furnish such a letter; still, there was no reason why they should not comply with the request, and they did so. Probably the Java-Pacific Line thought if they did not ship they could collect dead freight from the Pacific Coast Steel Company more easily than they could collect it from Chapman & Thompson. It is immaterial what the motive was. The letter of January 28th was written at the request of the defendants in the case, and by one of the parties to whom Chapman & Thompson gave the right, under their contract, to ship the freight.

Now, the February shipment is not involved in this case in any way. The plaintiffs allege as far as the February shipment was concerned the contract was performed. The only breach here is as to the March and April shipments, and not as to the February shipment.

Prior unications e partly al and y written

Now, we call attention, if your Honors please, in our brief to the fact that the communications between the parties in this case were partly oral and partly written. All the antecedent letters, prac-

tically, refer to contemporaneous oral negotiations between the parties. It is somewhat different from a case where the parties live in different cities, and all their negotiations are by letter or telegram. These parties saw each other every day, and only a small part of their communications were by letter. In fact, all their letters refer to oral communications. We stated that, unquestionably, where all the negotiations were not in writing or in letters, that if the written communications were admissible, the oral communications contemporaneous therewith would also be admissible, so the whole matter would be opened up. Of course, it is impossible, in the case at bar, that the correspondence introduced in evidence could be the entire communications between the parties, because the letters refer to various oral communications; and furthermore the contract, as finally settled upon, the last two letters set forth in the complaint, is different in almost every term from any of the tentative agreements referred to in any of the antecedent letters; the commodities are different; the rates are specified which were never mentioned in the antecedent letters; points of destination were mentioned, which were never mentioned in the antecedent letters; commodities are mentioned which were never mentioned in the antecedent letters; in fact, practically every term of the contract as finally agreed upon differs from any of the so-called agreements referred to in the antecedent communications.

Now, counsel says that there is no evidence of "oral negotiations unconfirmed by letters". Now, we do not see the point of that statement at all, and counsel has not shown what the point is.

It is wholly immaterial here what the oral communications in fact were. We are concerned only with the fact that there were oral communications.

We have stated that in this case the antecedent transactions and negotiations of the parties were evidenced by written and oral communications, and that is not denied by defendant in error, and cannot be denied, because the letters themselves, independent of the oral testimony in the case, show it.

I might refer to one particular letter, the letter written on the 22nd of January, 1916. This letter was written before the two final letters constituting the contract, and I would also state, if your Honors please, that although at the trial defendants in error were offering in evidence a great many letters and communications, they omitted to put this one in evidence; so, it was reserved for the plaintiffs to introduce it in evidence. The letter absolutely and conclusively refutes the contention that this space was for anyone else but Chapman & Thompson. The letter reads as follows: I am reading from page 115 of the record. It is a letter written on the letterhead of the Java-Pacific Line:

"San Francisco, January 22, 1916.

"Messrs. Chapman & Thompson,
Fife Building, San Francisco.

"Gentlemen:

"Confirming conversation with your Mr. Chapman on January 21st, wish to advise that our books show reservations *in your name* as follows:"

Then it goes on and states reservations.

"Trusting that this is the information you desire, and that you will find same agrees with your records, we are,

"Yours very truly,

"J. D. Spreckels & Bros. Co.

General Agents.

"Fred F. Connor, Traffic Manager."

Prior oral and prior written communications stand on same footing

Now, with reference to these prior letters, counsel evidently is under the impression that these antecedent letters which were not contractual in their nature, and which merely lead up to the contract, are somewhat more sacred than the oral communications which accompanied them and preceded them. That is not so. Not until two letters form a contract binding upon both parties is the rule that the conversations are inadmissible applicable. This rule is not applicable to any of the letters which have been referred to here. These letters are no more sacred than the conversations which they confirmed or to which they relate. (*Deshon* v. *Ins. Co.,* 52 Mass. 199, 17 *Cyc.* 599.) Until a written contract mutually binding was formed by the two last letters all prior transactions and agreements whether oral or written stand on the same footing. If a letter referring to a prior transaction is admissible in evidence so likewise are the oral communications which preceded the letters forming the contract.

Counsel has quoted from the brief of plaintiffs in error certain language contained in that brief. The quotation appears in pages 22 and 23 of their brief. The particular part to which I desire to call your Honors' attention is the following quotation from our brief:

> "If there had been no oral negotiations and the communications and transactions preceding the letters of January 27th and February 12th had been entirely by correspondence, it might be said that all letters form part of the same contract, and that nothing to the contrary appearing therein it would be presumed that the space reserved was for account of the steel company."

The last antecedent letter, viz., the letter of January 22nd conclusively shows that space was intended for Chapman & Thompson

Evidently the quotation has been singled out to base the further contention that we concede that nothing contrary appeared in any of these letters, which is absolutely not the case, because in a number of cases in the brief we state that the letter of January 22nd, which preceded these two letters absolutely showed the space was for Chapman & Thompson, and that letter was signed by defendants agents in this case who signed the other letters. So, the words used in our brief "nothing to the contrary appearing" mean that if nothing to the contrary *had* appeared it might be presumed that the space was reserved for the account of the steel company. But in this case, something to the contrary did appear in these letters—absolutely to the contrary—because the letter of January 22nd, written by the defendants in this case, stated that the space is *in your name.*

And we also state, if your Honors please, that if there is any statement in this brief which could be construed as an admission that where two letters form a contract in themselves, prior letters could be admissible in evidence to vary the terms or effect of the two final letters, complete in themselves as a contract, whether the communications between the parties were oral and written, or all in writing as where

the parties were in distant cities, that we absolutely recede from any such statement, and we maintain that even if in this case there had been absolutely no oral communications between the parties, that those two letters set forth in the complaint in this case, the legal effect of those two letters, could not be changed by any of the prior letters introduced in evidence, even assuming that those letters were all the communications between the parties and there were no oral communications. And this position is absolutely sustained by the authorities.

Immaterial that contract not complete as to May shipment

Counsel has made the statement "Completed contract question of intention". Counsel state the contract was not completed as to the May shipment. We are not claiming damages as to the May shipment. The only damages we are claiming are on account of the March and April shipments. The contract was not complete as far as the May shipment is concerned. The contract merely said, with reference to the May shipment, that the rates were to be quoted thereafter; but the covenants of this contract are severable and independent. It is a binding contract, absolutely, giving rates, destination and every other term with reference to the March and April shipments. It was not a contract at all as far as the May shipment was concerned, and we are not concerned with it. But counsel seems to make the contention because the contract, as he says, is not complete as to the May shipment, that that is a material fact in the case. But that cannot be so. The contract is clearly a complete contract as far as the February, March and April shipments are concerned. What difference does it make in this case whether it was complete as to the May shipment

or not? It conclusively appears from an inspection of the two letters that the contract was complete insofar as the February, March and April shipments are concerned.

Plaintiffs did not waive objections by also introducing extrinsic evidence in rebuttal

Now, if your Honors please, another statement is made by counsel to the effect that at the trial of this case, after the court, over our objections, had admitted in evidence these prior communications, we in rebuttal (as we were entitled to do) introduced oral testimony and letters also to show the intention was contrary to the intention contended for by the defendants, that the intention was that the space was for Chapman & Thompson. We introduced the letter of the 22nd of February from the defendants in the case, and we also introduced oral testimony of statements made by Mr. Chapman which are all set forth at pages 73 and 74 of the brief. Now, counsel makes the statement that by introducing this oral testimony we "waived the right" to object to the error of the court in overruling our demurrer to the answer and admitting the letters in evidence. Now, this contention amounts to this: That when contrary to the rule of substantive law—I will state, if your Honors please, this is not a rule of evidence at all, but a rule of substantive law, and the authorities are clearly to that effect, and they are cited in the brief—that when contrary to the rule of substantive law, and over plaintiff's objections, the court improperly allows the defendant to introduce extrinsic evidence to vary the terms or legal effect of a written contract, that the plaintiff cannot offer evidence in contradiction of the evidence so received without waiving the objection. That is what the contention

amounts to. Counsel says he is "bound to rest upon his objection".

Now, if your Honors please, even if the rule involved were purely a rule of evidence, such as the rule that secondary evidence of a lost or destroyed instrument is inadmissible without proof of loss or destruction, and one party without sufficient proof of loss had offered such secondary evidence, which was received over the objection of the adverse party, clearly the adverse party would not waive his objection by introducing additional secondary evidence in contradiction of the evidence introduced by the other party. And yet, that is what the contention is here.

But we have already seen this rule is superior to any rule of evidence. Rules of evidence, such as whether evidence is the best or secondary evidence, may be waived; the party, by not objecting, may waive the point that evidence introduced is not the best evidence, but he cannot waive this rule, and the authorities are clear to that effect. I have not with me the authorities to this effect, as I had but a short time to prepare this argument in answer to the brief filed, which I did not receive until Saturday afternoon. But I have read, both in Wigmore on Evidence, that is, Wigmore's Edition of Greenleaf and also in Chamberlayne on Evidence, that it is not competent for a party to waive the rule that parol or extrinsic evidence is not admissible to vary the terms of a written contract, because that is a rule of substantive law; and whether he objects or not, it is immaterial; he can always take advantage of the admission of such evidence. (*Dollar* v. *International*

Banking Corporation, 13 Cal. App. Rep. 331, 343.) If a plaintiff claiming under a written contract should introduce extrinsic evidence to vary its terms or legal effect, and no objection was made to such evidence, nevertheless there would be a failure of proof on the part of the plaintiff. However in this case the plaintiffs objected at every opportunity. There could be no possible question of waiver.

Steel Company not "principal in contract for March shipment"

Counsel asks this question on page 5 of the brief:

> If Pacific Coast Steel Company is the principal in the contract for the March shipment, by reason of the letter of December 24th, then why is it not the principal in the contract for the April shipment by reason of the letter of December 30th?

Those are two of the antecedent letters which have been introduced in evidence. The answer is that the Pacific Coast Steel Company is *not* the principal in the contract. The agreement referred to in the letter of December 24th—if it did not continue to exist; I don't think it did—was merged in the final written contract. After the letters of January 27th and February 12th were written, there was no longer an agreement between the Pacific Coast Steel Company and the defendant that the Pacific Coast Steel Company should have any space for March shipment.

Immaterial that after repudiation defendants accepted freight for March shipment from Steel Company

Now, if your Honors please, this matter is not material, but it illustrates the argument: The record shows that after this controversy arose, the Pacific Coast Steel Company wrote a letter to the plaintiffs in this case, stating that they were not the plaintiffs' principals, and a copy of this letter was sent by the

plaintiffs to the defendants and was introduced in evidence by the defendants. The letter reads as follows: It is on the letterhead of the Pacific Coast Steel Company, and is dated March 1, 1916:

"Messrs. Chapman & Thompson,

Fife Building, San Francisco, Calif.

Dear Sirs: We note your statement to the effect that the Java-Pacific Line claims that your contract with them for space on their steamers sailing for Hong Kong and Manila is not a contract with you as principals, but only as agents for us. This claim is not founded in fact. Under our employment of you as traffic managers, we expected that you would allow us to use such space as you had available and we desired, but the contract which you have with that line for space was not made by you as our agents, and we are not your principals in the matter.

Very truly yours,
Pacific Coast Steel Company,
By E. M. Wilson, President."

That letter was written after this controversy arose, after the breach of the contract, and a copy of it was given to the defendants in this case.

Now, the defendants took the position, after they breached the contract—not at the time of the breach, but subsequently—that this space was for the Pacific Coast Steel Company, and not for Chapman & Thompson. Therefore, they were very desirous, thinking that it would possibly help their case, that the Pacific Coast Steel Company should make the March shipment. Independent of the plaintiffs in this case they went to the Pacific Coast Steel Com-

pany and made an arrangement with the Pacific Coast Steel Company under which the Pacific Coast Steel Company shipped 300 tons in March. With this arrangement the plaintiffs in this case had nothing whatsoever to do. The Pacific Coast Steel Company, realizing evidently that they could not get the space at all through Chapman & Thompson, the contract with Chapman & Thompson having been repudiated by the defendants, thought that there would be a much better opportunity to get it from the Java-Pacific Company direct; so they wrote a letter to the Java-Pacific Line, under date of March 3rd, referring to a letter written by Chapman & Thompson on December 24th to the defendants, referring to a reservation of space for the Pacific Coast Steel Company, and claimed the space under that letter. That claim was acceded to by the defendants in this case, and they transported 300 tons for the Pacific Coast Steel Company, as shown by the evidence.

Of course, with this matter we have no concern whatever. The situation is just the same as if A made an agreement to sell certain commodities to B, and subsequently repudiated his agreement with B, and subsequent to the repudiation A informed B that the reason why he repudiated was that the contract was not with B at all, but with C, and that he does not recognize B in the matter; subsequently he sells to C.

That is just the case here. They delivered to the Pacific Coast Steel Company. It was no concern at all of B's. It is no concern of ours here. As far as these March and April shipments are concerned, the complaint and the evidence in this case are identical.

There is no difference whatsoever. In neither case was there any performance. In both cases there was a breach.

Now, what defendants really should have said when the Pacific Coast Steel Company wrote this letter asking for 300 tons in March was:

> "The contract we have made in this case is in writing, and is with Chapman & Thompson. Moreover, under your letter of March 1st, you stated you were not the principals of Chapman & Thompson. You also stated in that letter that you expected they would let you use space reserved in their name. We will accept your freight only if so directed by Chapman & Thompson."

Undoubtedly the Pacific Coast Steel Company would have obtained this space through Chapman & Thompson if the contract had not been repudiated by defendants.

Now, it was perfectly proper for Mr. Chapman, of Chapman & Thompson, on December 24th, to orally reserve 300 tons in March expressly for the Steel Company; to advise them of that fact, as he did, and, subsequently, to reserve the space in the name of Chapman & Thompson, as under Chapman & Thompson's agreement with the Pacific Coast Steel Company (referred to in letter from the Steel Company to the plaintiffs dated March 1st) the Steel Company was entitled to use any space that they desired from Chapman & Thompson. The Steel Company would never have had cause to complain if the defendants had not repudiated the contract. It was immaterial to the Steel Company in whose name the contract was made so long as they got the space.

Mr. Chapman not disingenuous

Now, if your Honors please, a criticism is made —absolutely irrelevant in this case—of certain testimony given by Mr. Chapman—the reference is the testimony of Mr. Chapman at page 121 of the record. Mr. Chapman testified that he said to Mr. Edwards, one of the defendants' representatives, "You understand that all of these bookings are for Chapman & Thompson".

Mr. Chapman was asked why he made the statement, and he replied, "Prior to that it was expected that the Pacific Coast Steel Company would use all or a good portion of that space; just prior to the 15th of January they advised us that they would not want it all." Mr. Chapman further testified that he did not advise Mr. Edwards that the Pacific Coast Steel Company would not want all the space. So because he did not advise Mr. Edwards that the Pacific Coast Steel Company would not want all the space it is said that he was disingenuous. Why was this disingenuous? There was nothing evasive in the statement that the bookings were all for Chapman & Thompson. The defendants knew that Chapman & Thompson were brokers, and they knew they did not have any steel, they were not in the steel business, and that it was perfectly natural that they should reserve space in their own name. Why should Chapman & Thompson go into the details of their business and advise who their customers were? They, clearly, were under no obligation whatsoever to do so.

Mr. Edwards was not called as a witness by defendants, and there is no contradiction of any of the testimony as to conversation with him.

Mr. Connor, the defendants' representative was disingenuous

It ill becomes the defendants in this case to charge Mr. Chapman with disingenuousness. There is nothing disingenuous about Mr. Connor's letter of February 26th, repudiating the contract. But if the real reason for the repudiation is that stated in this letter of February 29th, the first letter was certainly most disingenuous. The first letter I have already read to your Honors. The last-mentioned letter was written after the controversy had been referred to the attorneys for the respective parties, and probably the matters stated in the last-mentioned letter never occurred to Mr. Connor when he wrote the letter of repudiation. If it did, why didn't he so state? If there was any disingenuousness it was on Mr. Connor's part in not stating the real reasons for the repudiation, if the real reason was the reason stated in the subsequent letter.

Statement that letter of January 27th a "trap" absolutely refuted by defendants' letter of January 22nd

Now, on behalf of the plaintiffs in this case, we resent the statement made on page 17 of the brief, to the effect that

> "Plaintiffs did not advise defendants of the fact that the Steel Company would not require all space and ask defendants to accept him as principal, but attempted to commit them by indirection,—to trap them into it."

The implication here is that the letter of January 27th to the defendants is the trap set for the defendants. It is implied that when the defendants confirmed this letter by their letter of February 12th, they fell into the trap. This charge is absolutely and conclusively refuted by the letter from defendants signed by Mr. Connor, dated January 22nd, five days before the letter of January 27th was written by

plaintiffs. I have already read that letter to your Honors. It appears at page 115 of the record. It is a letter which the defendants in this case did not themselves introduce in evidence, and it states that "the space is reserved in your name". What more clear language could there be and how was Mr. Chapman setting any trap when he wrote the letter of January 27th and did not mention the Steel Company, when prior to that letter and not in answer to another letter, but in confirmation of an oral understanding, the defendants in this case had written to him that the space was reserved "in your name"?

Mr. Chapman also testified that Mr. Edwards showed him the book showing the reservations in the name of Chapman & Thompson. Mr. Edwards was not called as a witness. There is no contradiction of this testimony, nor did the defendants offer the book in evidence.

Now, if your Honors please, the brief of the other side starts out with the statement that this case "is founded on an undisguised attempt to make a subservient technicality defeat the ends of justice."

If your Honors please, when this case is considered it will be very apparent that it is the defendants in this case who are seeking to escape liability by a technicality. They made a contract with Chapman & Thompson, and when the freight rates went up, away up from $10 to $40 and $50, and from $25 up to $40 and $50, they wanted to get out of that contract if they possibly could, so that they could get the higher rates from somebody else; and that is why they repudiated the contract, and why they are now

attempting to claim that the contract was not with Chapman & Thompson. We said nothing about this in our brief, because we did not wish to bring a collateral matter into a case where the matter involved was purely one of law, but as counsel has made this statement, we feel that it is only right to make this reply to it, and that it clearly appears that the defendants in this case are relying upon technicalities. They are the ones who have "welched" and who are attempting to escape from liability because they wanted to make more money.

Measure of Damages

Now, if your Honors please, there is just one other matter before I conclude. Counsel has said that the measure of damages in a case of this kind is as follows:

> "The rule of damages is the difference between what we contracted to carry for and what he was compelled to pay another ship to carry the same cargo, and as he never had any cargo to send forward, as he never attempted to send any other cargo forward, he has suffered no damage."

The rule of damages in this case is stated in the case of *Ogden* v. *Marshall,* 8 N. Y. 340; I will read the syllabus:

> "In a case for the breach of contract to carry goods as freight, the measure of damages is the difference between the contract price and the market rate, and after refusal to perform the plaintiff need not show that he had cargo ready to ship."

That is absolutely in point here. The plaintiff in that case recovered that difference between the mar-

ket rate and contract rate, although he had no cargo ready to ship.

In a case decided by the Circuit Court of Appeals for the Sixth Circuit, *The Oregon,* 55 Federal, 666, the opinion in which was written by Judge Taft, the following statement is made. In this case the plaintiff had cargo to ship and recovered as damages the difference between the contract rate and what he had to pay. But Judge Taft said:

> "The measure of damages adopted can be supported in another way. Ore tonnage between Marquette and the Lake Erie ports west of Erie has a market value, which varies from month to month in the season. Under the construction put upon these charters by the parties, the libelant had the right to sell the tonnage thereby secured to it to anyone else, because, with the knowledge of the owners of the vessel, it did sell the tonnage for two trips without objection. Viewing tonnage as a commodity bought and sold, the measure of damages for failure to supply it according to contract would naturally be the difference between the market and the contract prices. *Higginson* v. *Weld,* 14 Gray 165; *Ogden* v. *Marshall,* 8 N. Y. 340. The price actually paid by the libelant was the going or market rate of freight, and the damages found by the court below were the difference between that rate and the contract rate."

The business of plaintiffs was to reserve space and to secure freight to be shipped in pursuance of reservations. This appears at page 49 of the Record.

Now, if your Honors please, there is one other case on the measure of damages which is also precisely in

point here. It is the case cited by Judge Taft, *Higginson* v. *Weld,* 80 Massachusetts Reports at page 173. It is cited by Judge Taft as 14 Gray, 165. In that case—

JUDGE GILBERT: That case will be cited in your brief?

MR. HARWOOD: None of these cases are cited in the brief for the reason that Judge Van Fleet ruled with us on the question of damages, and his instructed verdict was not based on any question of damages.

JUDGE GILBERT: It will be in the reported argument?

MR. HARWOOD: Yes, your Honor.

JUDGE GILBERT: Your time has expired.